IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Should this Court overturn the concurrent findings of fact of the two courts below that Mobile's at-large election system is maintained and operated for the purpose of discriminating against black voters?

2. Did the district court clearly err in finding that the Mobile's at-large elections "operate to minimize or cancel out the voting strength" of blacks in violation of White v.

Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971)?

3. Does Mobile's at-large election system violate the Fifteenth Amendment or section 2 of the 1965 Voting Rights Act?

4. Did the district court err in fashioning a remedy for the proven violation?

STATEMENT OF THE CASE

Black citizens brought this class action to challenge the at-large system for electing Mobile's city commission. The complaint alleged that the overall electoral structure was maintained to discriminate against blacks and that it permitted a hostile white majority to bar blacks from effective participation in the political process. The district judge heard 37 witnesses during a six day trial, received over 150 documentary exhibits (including computer analyses of election returns), and personally toured the city accompanied by the lawyers for all parties. In October, 1976, he issued extensive findings of fact and concluded that the at-large election of Mobile's city commissioners unconstitutionally diluted black voting strength, and was invidiously discriminatory in purpose. J.S. 40b-42b.

Following the failure of a bill to reapportion Mobile in the 1976 state legislature, and in light of the imminence of city elections in August 1977, the district court asked the parties to propose remedial plans. The city defendants opposed the election of a commission from single-member districts, and expressed a preference for a mayor-council form of government if single-member districts were to be used. The defendants, however, refused to propose any plan that did not fully preserve at-large elections, although agreeing to nominate two persons whom the court appointed to a three-man advisory committee. The advisory committee proposed a mayor-council plan based largely on the mayor-council plan in operation in Montgomery, an Alabama city of comparable size. After soliciting further comments from all parties and from various other Mobile elected officials, and after making certain modifications, the district court adopted the committee's single-member district plan and ordered that it be used in the 1977 elections. At the same time, the court offered to dissolve its injunction should the

legislature enact its own constitutional plan, and it stayed the remedial elections pending appeal. J.S. 3d; A. 8.

The court of appeals affirmed the district court's judgment and findings of fact. It rejected the city's contention that an election system may be maintained for a discriminatory purpose so long as it was originally created for a racially neutral reason. J.S. 13a-17a.

SUMMARY OF ARGUMENT

I. Section 2 of the 1965 Voting Rights Act prohibits the use of election practices which "deny or abridge the right . . . to vote on account of race or color." This should be construed in pari materia with section 5 of that Act which forbids certain jurisdictions to use new election practices which will have the "purpose . . . or . . . effect" of so denying or abridging the right to vote. Both sections are concerned with the same type of denial or abridgement; section 5 merely establishes special procedures for new practices in particular states and subdivisions.

The meaning of the Act as applied to districting plans is well established. Blacks cannot be subjected to a districting system which would "nullify their ability to elect the candidate of their choice." Allen v. Board of Elections, 393 U.S. 544, 569 (1969). The courts below correctly found that Mobile's at-large election system operated in just that manner.

II. The courts below found that Alabama had rejected the use of single-member city council districts in Mobile in order to prevent the election of black city officials. The evidence before those courts included uncontradicted testimony by members of the state legislature that this was the reason for maintaining at-large elections, as well as a long history of intentional discrimination by Alabama officials against black voters. At-large plans adopted by the legislature for electing the state House and officials of other cities have been invalidated by other court decisions as racially motivated. This Court should not disturb the concurrent findings of fact of the two courts below that the legislature was also acting from racial motives in rejecting plans to permit Mobile to use single-member districts.

The courts below correctly held that a racially motivated decision to maintain a practice or procedure violates the Fourteenth Amendment even if the practice or procedure was originally created for a racially neutral purpose. In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 268 (1977), which establishes the method of proving racial motivation, the decision at issue was a refusal to alter a preexisting zoning classification.

III A. Reynolds v. Sims, 377 U.S. 533 (1964), prohibits the use of election systems which systematically overweight the votes of one group while underweighting the votes of another. In Reynolds that unequal weighting was achieved by placing voters in districts of unequal population. Fortson v. Dorsey, 379 U.S 433 (1965), recognized that such unequal weighting could come about in other ways including, under certain circumstances, through the operation of an at-large election system.

White v. Regester, 412 U.S. 755 (1973), presented such circumstances. In that case whites by voting as a bloc selected and controlled

all the legislators elected at-large from Dallas and Bexar counties in Texas. The votes of blacks and Mexican-Americans were thus systematically nullified. The system was the functional equivalent of one in which all whites lived in a district with an excess number of legislators, while blacks and Mexican-Americans lived in a district with no representatives at all. As a result of this system virtually no blacks or Mexican-Americans were elected to the legislature, and the white legislators were unresponsive if not hostile to the interests of minority voters. White was not based on the existence of racially exclusive slating practices; there was no slating in Bexar county, and the slating in Dallas county was merely symptomatic of the underlying racial and political realities.

B. White does not require a showing of racial motivation in the creation or maintenance of the at-large system. Fortson and its progeny repeatedly stated that they applied to at-large election systems which "designedly or otherwise" minimize the voting strength of a disfavored

group. 379 U.S at 433. White itself contained no discussion of the purposes behind the Dallas and Bexar county plans. White, as Reynolds v. Sims, derives from that branch of Equal Protection law which prohibits interference with or impairment of the franchise because it is "a fundamental right." Washington v. Davis, 426 U.S 229 (1976), on the other hand, applies to the Equal Protection prohibition against "racial classifications", and only as to that aspect of the Fourteenth Amendment is proof of racial intent necessary.

This Court has subsequent to Washington v. Davis repeatedly referred with approval to the dilution rule of White. Connor v. Finch, 431 U.S. 407, 422 (1977); United Jewish Organizations v. Carey, 430 U.S 144, 165, 170, 179 (1977).

C. The appellants never urged in the lower courts that White was inapplicable to city elections, and have thus abandoned the issue. White should be applied to the election of local government officials. Reynolds v. Sims, from which White stems, applies to such local elections.

Avery v. Midland County, 390 U.S 474 (1968). Elections of local officials frequently have a far greater impact on voters than the selection of state legislators. This Court applied the White standards to the election of city officials in Beer v. United States, 425 U.S. 130, 142 n.14 (1976).

D. The courts below correctly found that Mobile's at-large election system operates to effectively disenfranchise black voters. The evidence showed, and the district court found, that whites vote as a bloc against black candidates or white candidates who are supported by black voters, that no black has ever won an at-large election in Mobile, that no black candidate could do so under the present system, and that under the all-white city commission Mobile had engaged in a wide variety of practices discriminating against its black residents. The record in this case contains the same evidence deemed sufficient to establish a constitutional violation in White. The district court's finding of such a violation, resting on "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multi-member

district in the light of past and present reality, political and otherwise," should be upheld. White v. Regester, 412 U.S at 769.

IV. The Fifteenth Amendment prohibits the use of election systems "which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." Lane v. Wilson, 307 U.S. 268, 275 (1939). Lane does not require any showing that such barriers were racially motivated. In view of the fact that the Fifteenth Amendment singles out the franchise for special protection, a broader standard is appropriate for election laws burdening blacks than under the general prohibition against racial classifications contained in the Fourteenth Amendment. See Washington v. Davis, supra.

V. The district court did not err in formulating the remedy in this case. Despite the finding of a violation the defendants refused to propose or enact a remedy. The defendants did indicate, however, that if at-large elections were

to be abolished, they opposed continuation of the commission form of government and preferred a mayor-council plan. The district judge therefore ordered into effect a mayor-council plan based largely on the mayor-council plan in operation in Montgomery, Alabama. The court further provided that its plan could at any time be superseded by any other constitutional plan authorized by the legislature. Thus Alabama is free to use a commission form of government with commissioners elected from single-member districts, a system actually utilized in several other states.

ARGUMENT

I. MOBILE'S AT-LARGE SYSTEM OF ELECTION VIOLATES SECTION 2 OF THE 1965 VOTING RIGHTS ACT

The complaint in this action alleges that Mobile's at-large election system violates section 2 of the 1965 Voting Rights Act. A. 18. That provision, codified in 42 U.S.C. §1973, provides:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Both courts below noted the existence of this statutory claim, but neither decided it. J.S. 4a-5a n.3; A. 27. The practice of this Court, however, is to avoid the decision of constitutional issues if it is possible to resolve a case on non-constitutional grounds. Wood v. Strickland, 420 U.S. 308, 314 (1975); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944).

Section 2 does not on its face require that a forbidden practice involve a purpose of denying or abridging the right to vote. The phrase "on account of" appears to contemplate some causal relation between abridgement and the race of the victim, but does not suggest that that connection must be a motive to discriminate in the mind of a legislator. The legislative history of section 2 throws no direct light on the meaning of that provision.

Elsewhere in the Voting Rights Act, however, Congress provided a more complete definition of the types of election practices it sought to prohibit. Section 5 of the Act, 42 U.S.C. §1973c, establishes special procedures for reviewing new election laws and procedures in certain

jurisdictions, providing that such a law and procedure may not be enforced unless the jurisdiction involved can establish that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." As used in section 5 the phrase "on account of" cannot refer to legislative motivation, or section 5 would turn on the presence of a "purpose or effect of purposefully denying or abridging the right to vote."

It is unlikely that Congress used the words "on account of" in section 2 in a different sense than they were used in section 5. On the contrary, section 2 should be construed in pari materia with section 5. See Erlenbaugh v. United States, 409 U.S 239, 243-44 (1973). This Court has consistently taken account of a later statute "when asked to extend the reach of [an] earlier Act's vague language to the limits which, read literally, the words might permit." N.L.R.B. v. Drivers Local Union, 362 U.S. 279, 291-92 (1960). "[I]f it can be gathered from a subsequent statute in pari materia what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of

its meaning. . . ." United States v. Freeman, 3 How. (44 U.S.) 556, 564-65 (1845). These considerations apply with particular force when construing related portions of a single statute. In this case section 5 of the Voting Rights Act should be regarded as identifying with greater specificity the types of prohibited practices alluded to more vaguely in section 2.

This construction serves to give to the Voting Rights Act "the most harmonious, comprehensive meaning possible." Clark v. Uebersee Finanz-Korp, 332 U.S. 480, 488 (1947). Section 5 is "an unusual, and in some respects a severe, procedure for insuring that states would not discriminate on the basis of race in the enforcement of their voting laws." Allen v. Board of Elections, 393 U.S. 544, 558 (1969) (emphasis added). With regard to new election practices in covered jurisdictions, section 5 requires approval prior to implementation, limits approval proceedings to submissions to the Attorney General or an action before a three-judge federal court in the District of Columbia, and places the burden of proof as to factual issues on the proponents of the proposed practice. These procedures were fashioned to

shift the advantages of time and inertia from the perpetrators of the evil to its victims." United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148, 160 (1978). There is, however, no reason to believe that Congress also intended to set a different substantive standard under section 5 than the standard established by section 2 for old laws in the covered jurisdictions and for new and old laws in the rest of the country.

If sections 2 and 5 contained different substantive standards a number of anomalies would result. Within a state covered by section 5 a single election law could be valid in one city and invalid in another based solely on the date on which each city put the law into operation. See Perkins v. Matthews, 400 U.S. 379, 394-95 (1971). Practices forbidden in section 5 jurisdictions would be permissible in the other states, even though the practices had the same purpose and effect in both instances. Section 4 of the Voting Rights Act did establish temporarily a narrowly focused different substantive standard for covered jurisdictions, prohibiting there the use of certain specified "tests or devices"; but Congress in that instance was well aware it was establish-

ing different election rules than existed outside the South, and it acted to abolish that distinction five years later by making that ban nationwide. Oregon v. Mitchell, 400 U.S 112, 133-34 (1970). This Court should not in the absence of clear congressional intent read back into the Act different substantive standards falling along regional lines.

Once it is recognized that the standard for judging election practices is the same under section 2 as under section 5, the application of section 2 to this case is not difficult. Jurisdiction over section 2 actions is conferred on the federal courts by 28 U.S.C. §1343(4). Allen v. Board of Elections, 393 U.S. 544, 554-57 (1969), holds that section 5 can be enforced by private actions; the reasoning of Allen applies a fortiori to section 2, since the Attorney General is not expressly authorized to enforce that section, and absent private enforcement the guarantees of section 2 might well "prove an empty promise." 393 U.S. at 557.

That the use of at-large elections may have the effect of denying or abridging the right to vote under section 5 has been repeatedly recog-

nized by this Court. City of Richmond v. United States, 422 U.S. 358, 371 (1975); Georgia v. United States, 411 U.S. 526, 532-35 (1973); Perkins v. Matthews, 400 U.S 379, 388-91 (1971). City of Richmond noted that such at-large elections may do so by "creat[ing] or enchanc[ing] the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council." 422 U.S. at 371. The record and findings in this case, which we set out in detail infra at pp. 67-82, demonstrate that Mobile's at-large election system had just such an impact. That system placed 67,000 blacks in a district with 122,000 whites, enabling the whites by bloc voting to consistently exclude from the city commission not only blacks but even whites who had revealed an interest in serving the needs of the black community. The system predictably resulted in a city government which discriminated in virtually every phase of its activities against black residents of the city. This evidence was sufficient to meet plaintiffs' burden of establishing a violation of section 2 of the Voting Rights Act.

II. MOBILE'S AT-LARGE SYSTEM OF ELECTION IS MAINTAINED AND OPERATED FOR THE PURPOSE OF DISCRIMINATING ON THE BASIS OF RACE

Although the Questions Presented described in the Jurisdictional Statement and Brief for Appellants deal primarily with the application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the decisions below invalidated Mobile's at-large method of election based on a finding of discriminatory intent. J.S. 12a-15a, 30b. The constitutional prohibition against such racially motivated election schemes is well established. Gomillion v. Lightfoot, 364 U.S. 339 (1960). Accordingly the first constitutional issue presented by this appeal is the correctness of the factual findings of discriminatory intent made by the lower courts. This Court does not ordinarily "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Appellees maintain that no such unusual circumstances are present here.

An assessment of the factual findings of the courts below must begin with an understanding of the history and details of Alabama statutes regarding the structure of municipal government. City and town governments fall into three categories. First, the structure that prevailed throughout the nineteenth century, and which continues today, is a mayor-alderman government; under this plan the method of electing aldermen depends on the size of the city and number of wards within it.[1/] A city the size of Mobile would ordinarily elect most if not all of its aldermen from single-member districts.[2/] Second, since 1911 Alabama municipalities have also been authorized to use the commission form of government, under which three commissioners are elected at large and perform both legislative and ad-

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1/ Ala. Code §11-43-40 (1975).

2/ Mobile presently has 31 wards. If it adopted the mayor-alderman system Mobile would be required by section 11-43-40 to reduce the number of wards to no more than 20; the city council would consist of one member from each of these districts plus a council president elected at-large.

ministrative functions.[3] Alabama general law permits cities to adopt either the mayor-alderman or commission form of government by referendum. Of 420 Alabama cities only 14 presently use the commission system.[4] In recent years, however, the mayor-alderman plan has proved unsatisfactory, particularly for the larger cities, because the mayor's powers are too weak.[5] Accordingly, authorization has been sought from the legislature for a third form of government, a mayor-council plan with a strong mayor. Instead of adopting general legislation permitting all municipalities to choose this plan, however, the legislature has authorized it only on a case-by-case basis for particular cities. A mayor-council plan was

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3/ Ala. Code §11-44-1, et seq. (1975).

4/ The Alabama cities governed by commissions are Arab, Bessemer, Brundidge, Cherokee, Florence, Gadsden, Jasper, Madison, Mobile, Muscle Shoals, Opelika, Troy, Tuscaloosa and Tuscumbia.

The use of the commission form of government nationally is similarly uncommon. As of 1978 only 114 of 2477 cities over 10,000 used such commissions, less than 5%. Municipal Yearbook: 1978, Table 3.

5/ The most serious problem is that the council of aldermen can interfere with routine executive functions. Tr. 349, 1152.

authorized for Birmingham in 1953[6] and for Montgomery in 1973;[7] in both cases the city voters chose in a subsequent referendum to adopt such a plan in place of the commission form of government.

The actions with which the courts below were primarily concerned were refusals by the legislature in 1965 and 1976 to permit the people of Mobile to adopt a mayor-council plan under which the city council could be elected from single-member districts. In 1965 the legislature authorized Mobile to adopt a mayor-council plan, but expressly considered and refused to allow Mobilians to opt for single-member districts.[8] In 1976 the legislature considered and rejected a proposal, known as the "Roberts Bill",[9] to authorize Mobile to choose a mayor-council plan with seven single-member districts and two at-

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6/ Ala. Code App. §1603 et seq. (1966 Supp.).

7/ Ala. Code App. §1247 (216a) et seq. (1974 Supp.).

8/ Ala. Acts. Reg. Sess. 1965, No. 823; see also P. Ex. 98, pp. 40-41.

9/ A. 249, 250, 256.

large council members. In each case, we maintain, and the courts below found, that the refusal to allow Mobile to adopt single-member districts was caused by fear that such districts would permit the election of black candidates.

In Alabama proposals affecting only one city are not as a practical matter considered by the whole legislature. The actual functioning of the legislature was described in detail by the district court:

> The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on a unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be perfunctorily approved if the Mobile County House delegation unanimously approves it. J.S. 29b-30b.

Thus the decisions to forbid Mobile voters to choose a plan with city councilmen elected from single-member districts were made by the Mobile legislative delegation.

The evidence before the district court included direct testimony by members of the Mobile legislative delegation who were in office when single-member council districts were rejected in 1965 and 1976. Robert S. Edington, who served in the Alabama legislature from 1962 to 1974, testified candidly about the reason for rejecting such districts in 1965:

> Q. Why was the opposition to single member districts so strong?
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> A. At that time, the reason argued in the legislative delegation, very simply was this, that if you do that, then the public is going to come out and say that the Mobile legislative delegation has just passed a bill that would put blacks in city office. Which it would have done had the city voters adopted the Mayor Council form of government. P. Ex. 98, p. 43.

Senator Roberts testified that in 1976, even though the Mobile delegation was well aware that blacks could not be elected or "be able to elect candidates of their choice" if only multi-member

districts were used, a white State Senator from Mobile had vetoed the Roberts proposal to create some single-member districts. A. 255-58. Representative Gary Cooper was "relatively certain" the Roberts Bill had been opposed in the legislature because "it would allow the possibility for blacks to hold public office in the City government". P. Ex. 99, p. 20. Representative Cain J. Kennedy explained that the prospect of blacks winning public office was the primary area of legislative concern regarding 1975 proposals for single-member district elections for the school board and county commission. P. Ex. 100, pp. 29-30. Such direct testimony about the statements and motives of the legislators who made the actual decisions in 1965 and 1976 was "highly relevant." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

The direct evidence was supported by the evidence and the district court's conclusions that the impact of the decision to reject single-member districts bore "more heavily on one race than another." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266. No

black has ever been elected to the at-large commission, and no black has ever won any at-large election in Mobile City or County. Numerous witnesses familiar with the local political and racial situation in Mobile testified that no black could win such an at-large election.[10/] The district court concluded:

> Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a city-wide election because of race polarization. J.S. 10b.

Thus the effect of barring the adoption of single-member council seats, an effect of which the legislators were well aware, was to prohibit the election of blacks to city office in Mobile.

That that prohibition was the purpose, and not merely the effect, of the legislative decisions of 1965 and 1976 is also confirmed by the long and deplorable history of discrimination in voting by Alabama officials. The Alabama Con-

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10/ See n. 41, infra.

stitutional Convention of 1901 enacted a number of measures intended to disenfranchise blacks, including a poll tax, a literacy test, and education, employment and property qualifications. Those requirements were so effective that by the end of World War II only 275 blacks were registered in Mobile County, compared to 19,000 whites.[11] United States v. State of Alabama, 252 F.Supp. 95 (M.D. Ala. 1966), held that the purpose of these measures was to subvert the Fourteenth and Fifteenth Amendments, and declared the poll tax invalid because of the discriminatory intent behind it.[12] In 1903 the legislature authorized

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11/ P. Ex. 2, McLaurin, "Mobile Blacks and World War II: The Development of a Political Consciousness," 4 Proceedings of the Gulf Coast History and Humanities Conf. 47, 50 (1973).

12/ One convention delegate explained:

"* * * We want the white man who once voted in the state and controlled it to vote again. We want to see that old condition restored. Upon that theory we took the stump in Alabama having pledged ourselves to the white people upon the platform that we would not disfranchise a single white man if you trust us to frame an organic law for Alabama, but it is our purpose, it is our intention, and here is our registered vow to disfranchise every Negro in the state and not a single white man." 252 F.Supp. at 98.

political parties to exclude voters from primary elections on the basis of race;[13] the state Democratic Party adopted an all-white primary which remained in effect until well after Smith v. Allwright, 321 U.S. 649 (1944). In 1946 the state adopted a measure requiring voters to interpret any provision of the Constitution; three years later it too was struck down as an unconstitutionally motivated "contrivance by the State to thwart equality in the enjoyment of the right to vote by citizens of the United States on account of race or color". Davis v. Schnell, 81 F.Supp. 872, 879 (S.D. Ala. 1949), aff'd 336 U.S. 933 (1949). Discriminatory application of registration requirements continued as a brutally effective method of excluding blacks until adop-

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13/ Ala. Acts, 1903 Reg. Sess., No. 47, § 10.

tion of the Voting Rights Act of 1965.[14] When increased black registration appeared inevitable, Alabama officials resorted to more sophisticated measures to effectively disenfranschise blacks. In 1957 the legislature gerrymandered virtually all blacks out of the city of Tuskegee; this Court held that such a clear "impairment of voting rights" could not be accomplished by cloaking it "in the garb of the realignment of political subdivisions." Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960).

Mobile itself was the subject of special legislative attention. By 1956, despite the variety of discriminatory measures then in force,

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14/ See, e.g., United States Commission on Civil Rights, With Liberty and Justice for All, pp. 59-75 (1959); United States Commission on Civil Rights, Voting, pp. 23-28 (1961). A list of injunctions in force against Alabama officials is set out in Sims v. Baggett, 247 F.Supp. 96, 108, n.24 (M.D. Ala. 1965). See also State of Alabama v. United States, 192 F.Supp. 677 (M.D. Ala. 1961), aff'd 304 F.2d 583 (5th Cir.), aff'd 371 U.S. 37 (1962).

14% of Mobile's voting age black population was registered. A. 574. With fear of desegregation a burning political issue in the wake of Brown v. Board of Education, 347 U.S 483 (1954), and with the Eisenhower Administration pressing for enactment of what was to become the Civil Rights Act of 1957, special sessions of the Alabama legislature sought to preserve the state's segregationist policies. The legislature enacted proposed constitutional amendments to authorize legislation establishing private, racially segregated schools[15] and transferring public recreational facilities to private control[16] Resolutions were adopted denouncing Brown itself and proclaiming Alabama's "deep determination" to preserve its long established discriminatory policies.[17] Along with

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15/ Ala. Acts. 1956 1st Extra. Sess., No. 82.

16/ Ala. Acts. 1956 2d Extra. Sess., No. 67.

17/ Ala. Acts. 1956 2d Extra. Sess., No. 58.

this avowedly racist program, the legislature adopted a statute annexing to Mobile several substantial white suburbs, thus tripling its total area, but carefully excluding two nearby black neighborhoods.[18] But for this annexation the 1970 population of Mobile would have been 54% black, compared to the 35% minority within the present enlarged boundaries.[19] Cf. City of Richmond v. United States, 422 U.S. 358 (1975).

In 1965 the legislature adopted a local law[20] mandating the allocation of specific executive functions to each of the Mobile commissioners; the Attorney General, acting under section 5 of the 1965 Voting Rights Act, interposed an objection to this statute on the ground

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18/ Ala. Acts, 1956 2d Extra. Sess., No. 18. These neighborhoods had originally been included in the bill when, as required by state law, its contents were advertised in the local papers. Mobile Register, March 2, 1956, p. 1A.

19/ The annexed area is the southwest section of the city boardered by Interstate 10 on the north and Interstate 65 on the east. The 26 census tracts in this area have a population of 70,689, of whom 67,414 are white. The total population of the city is 189,986, of whom 122,100 are white. United States Census, City County Data Book, p. 630 (1972).

20/ Ala. Acts, 1965 Reg. Sess., No. 823.

that it would as a practical matter preclude the election of commissioners from single-member districts. J.S. 3a, n.2

In recent years the principal device used to disenfranchise Alabama blacks has been the creation or maintenance of multi-member districts which submerge large concentrations of black voters.[21] Perkins v. Matthews, 400 U.S. 379, 389 (1971). In 1965 the legislature created a number of multi-county multi-member districts for electing the state House; they were struck down as racially motivated in Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala. 1965). Hendrix v. McKinney, ____

21/ The shift to at-large election schemes as a fallback against the growing numbers of newly enfranchised blacks is characteristic of other Southern states as well. See Zimmer v. McKeithen 485 F.2d 1297, 1304 (5th Cir. 1973)(en banc), aff'd sub nom., East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Jenkins v. City of Pensacola, ____ F.Supp. ____ (N.D. Fla., Aug. 11, 1978); Paige v. Gray, 437 F.Supp. 151 (M.D. Ga. 1977); Stewart v. Waller, 404 F.Supp. 206 (N.D. Miss. 1975); Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523, 552-55 (1973); Parker , "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," 44 Miss. L. J. 391 (1973).

F.Supp. ____ (M.D. Ala. 1978), held that the at-large plan for electing the Montgomery County Commission was adopted by the legislature in 1957 "to dilute black voting strength". ___ F.Supp. at ____. Proposals to elect Democratic party officials at-large were found to have a discriminatory purpose in United States v. Democratic Executive Committee, 288 F.Supp. 943 (M.D. Ala. 1968), and Smith v. Paris, 257 F.Supp. 901 (M.D. Ala. 1966), aff'd, 386 F.2d 979 (5th Cir. 1967). Acting under section 5 of the Voting Rights Act, the Department of Justice has disapproved a series of Alabama statutes to create new at-large districts on the ground that they had the purpose or would have the effect of discriminating on the basis of race.[22/]

The historical background of the 1965 and 1976 decisions thus reveals "a series of official actions taken for invidious purposes". Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S at 267. Indeed, that history includes one of the same official actions which

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22/ Hearing Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 598 (1975); see also United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148 (1978).

Arlington Heights cited as an example of such a history of discrimination, 429 U.S. at 267, citing Davis v. Schnell, and involves the same discriminatory device at issue in this case.

In light of this evidence the courts below properly concluded that the decisions of 1965 and 1976 were racially motivated. The district court held:

> The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to black voters passing until the State was redistricted by a federal court order. J.S. 30b.

The Fifth Circuit noted the existence of "direct evidence of the intent behind the maintenance of the at-large plan". J.S. 14a. It concluded that "the district court's findings are not clearly erroneous", J.S. 12a, and that they support its conclusion that "invidious discriminatory purpose was a motivating factor" in the maintenance of

Mobile's at-large election scheme. J.S. 15a.[23/]

The court of appeals properly held that a law which is maintained for a discriminatory purpose is unconstitutional regardless of the motive which led to its original enactment. J.S. 13a-14a. Arlington Heights itself recognized that a racially motivated decision to maintain the zoning classification of a particular lot would violate the Fourteenth Amendment regardless of the origin of that classification. 429 U.S. at 257-58, 268-71 n.17. In this case we have, not unexplained and perhaps unconsidered legislative

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23/ In a companion case, Nevett v. Sides, the court of appeals noted that much of the evidence which would support a finding of dilution under White v. Regester, 412 U.S. 755 (1973), would also be evidence of a discriminatory purpose in establishing or maintaining the at-large system. 571 F.2d 209, 222-25 (5th Cir. 1978). Nevett suggested that "under proper circumstances" evidence sufficient to establish dilution might also be sufficient to establish a prima facie case of intentional discrimination. 571 F.2d at 223. What those circumstances might be was not decided by the court of appeals. Neither is that issue presented by the instant case, since, as the Fifth Circuit noted, J.S. 14a, the record in this case contains an array of other types of evidence, both direct and circumstantial, of discriminatory intent.

inaction, but two affirmative and express legislative decisions. The first is the adoption of a statute in 1965 from which the possibility of single-member districts was intentionally excluded. The second is the de facto veto by a single state senator of a single-member council plan. So long as the motivation involved is impermissible, no ground exists for distinguishing these legislative actions from others to which the Fourteenth and Fifteenth Amendments apply.

This case well illustrates the widsom of the two court rule. The evidence in the record would be sufficient to require a finding of discriminatory motive even if this Court undertook to reconsider that issue de novo. But the decisions of the courts below, especially that of the district court, involve more than the review of a cold record. In conducting the "sensitive inquiry" contemplated by Arlington Heights, the district judge was able to bring to bear an understanding of local political, legislative and racial realities born of years of legal, judicial and practical experience in the state. He was able to assess the demeanor of the witnesses who testified with direct personal knowledge of the

motives of the legislature. Both courts below were able to weigh the evidence with a sensitivity to the continuing problems in states with long histories of de jure segregation. No judge lightly undertakes to enter a finding of intentional discrimination; the decision in a case such as this is invariably tempered by a desire not to impugn the motives of local public officials. When a district judge is compelled to conclude that those officials have acted from racial malice, and does so on a record as substantial as that in the instant case, that conclusion is entitled to the "great weight . . . accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances." Mayor v. Educational Equality League, 415 U.S. 605, 621 n.20 (1974).

II. THE DISTRICT COURT CORRECTLY APPLIED THE PRINCIPLES OF WHITE v. REGESTER AND WHITCOMB v. CHAVIS

In affirming the district court finding of unconstitutionality the court of appeals relied on the district court finding of purposeful discrimination. J.S. 12a-15a. The district court had also found that Mobile's at-large plan impermissibly diluted the votes of black residents in violation of White v. Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971). J.S. 22b, 33b-34b. The court of appeals upheld those findings of fact as well, agreeing that they "amply support the inference that Mobile's at-large system unconstitutionally depreciates the value of the black vote." J.S. 12a. The court of appeals, however, thought that a violation of White required a finding of discriminatory purpose. J.S. 2a. Appellees maintain that White prohibits at-large plans that have such effects regardless of the motivation behind them; accordingly we urge that these findings afford an alternative ground for affirmance.

A. The Legal Standard Established By White and Whitcomb

The dilution standard applied in White and Whitcomb derives from the one-person, one-vote rule of Reynolds v. Sims, 377 U.S. 533 (1964). Reynolds proceeded from the principle that "any alleged infringement of the right of citizens to

vote must be carefully and meticulously scrutinized" because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." 377 U.S. at 561. In Reynolds, also an Alabama case, there were no formal or party barriers to voting. But this Court held:

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.... It also includes the right to have the vote counted at full value without dilution or discount.... That federally protected right suffers substantial dilution ... [where a] favored group [h]as full voting strength ... [and] the groups not in favor have their votes discounted. 377 U.S. at 555 n.19.

Nothing on the face of the districting plan in Reynolds demonstrated such unequal weighting of votes, but evidence regarding the population of the state senate districts proved that such inequalities existed. 377 U.S. at 568-570.

Only six months after Reynolds this Court recognized that population differences were not the only way in which a facially neutral district-

ing plan might undervalue the votes of some and overvalue the votes of others. Fortson v. Dorsey, 379 U.S. 433 (1965), held that the use of multi-member districts was not unconstitutional per se merely because at-large voting "could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters" of an area large enough to constitute a single-member district. 379 U.S. at 438. But, Fortson warned:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. 379 U.S. at 439.

In such a case a 60% majority, if it voted as a bloc, could control the selection of 100% of the at-large officials; the votes of the majority would carry full weight, while the votes of the minority would have no value whatever. It would be the functional equivalent of a scheme in which the 60% majority resides in a district with more representatives than were warranted by the

population of the district, while the 40% minority lived in a district with no representatives at all.

The next year Burns v. Richardson, 384 U.S. 73 (1966), held that a scheme which in fact "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population" would "constitute an invidious discrimination," 384 U.S. at 88, but concluded that the multi-member plan in that particular case had not been shown to have such an "invidious result." 384 U.S. at 88-89. Burns noted that there was no evidence in the record in that case that the disputed plan, under the local conditions there involved, would "by encouraging bloc voting ... diminish the opportunity of a minority ... to win seats." 384 U.S. at 88 n.14.

The first detailed consideration of the dilution standard came in Whitcomb v. Chavis, 403 U.S. 124 (1971), where the Court rejected a claim that a multi-member plan for electing state legislators in Marion County, Indiana, would operate to minimize the voting strength of black voters. The Court held that the requisite minimizing effect had not been proven. Whitcomb

emphasized that, as in Burns, black candidates had not lost because of bloc voting against blacks, but because of ordinary partisan voting. 403 U.S. at 134 n.11. Blacks had been regularly nominated by both the Democratic and tje Republican parties, and had lost, when they did, only when their entire party slate went down to defeat. 403 U.S. at 150 n.30, 152-53.[24/] Thus direct evidence demonstrated that minority voters had not been disenfranchised by majority bloc voting against minority candidates.

Whitcomb noted that this direct evidence was confirmed by other evidence regarding the politi-

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24/ It appeared that in 99% of all elections since 1920 no candidate had lost when the rest of his or her party's slate prevailed. Chavis v. Whitcomb, 305 F.Supp. 1364, 1385 (S.D. Ind. 1969). The importance of partisan rather than racial considerations is underlined not only by the fact that blacks often won in the majority-white multi-member districts, but also by the fact that black voters voted against even black Republican candidates. Graves v. Barnes, 343 F.Supp. 704, 727 n.18 (W.D. Tex. 1970).

cal and racial realities in Marion county. First, minority candidates were not totally excluded from the legislature or kept at nominal levels; on the contrary, nine blacks had in fact been elected to the legislature from the at-large district between 1960 and 1968. They had won on their own strength, not as tokens appointed and controlled by white officials. 403 U.S. at 150 n.29. These electoral victories were inconsistent with the hypothesis that the white majority was regularly electing slates composed solely of white legislators catering only to white concerns. Second, there was no evidence or finding that the white legislators were unresponsive to the needs and interests of their black constituents. 403 U.S. at 152, 153-4, 155 n.32. Such responsiveness might have been expected if the political and racial realities had resulted in an undervaluation of black votes. Third, there was no evidence of a history of official discrimination likely to generate or reinforce the sort of racial attitudes that would result in bloc voting against candidates from, or supported by, the black community. The record revealed no incidents of public or private discrimination for several decades prior

to the disputed elections, and the state had had a civil rights law since 1885. Graves v. Barnes, 343 F.Supp. 704, 727 n.18 (W.D. Tex. 1972).

White v. Regester, 412 U.S. 755 (1973), presented the kind of evidence found absent in Burns and Whitcomb. White held that the use of multi-member districts had operated to "cancel out or minimize the voting strength of racial groups" in Bexar and Dallas counties in Texas. There was direct evidence of bloc voting by whites in Bexar County;[25/] in Dallas the existence of bloc voting was indicated by the successful use of "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." White v. Regester, 412 U.S. at 767.

This direct evidence of the differing value of black and white votes was confirmed by other evidence. The multi-member system resulted in near total exclusion of minority legislators.

25/ "The record shows that the Anglo-Americans tend to vote overwhelmingly against Mexican-American candidates . . . ." Graves v. Barnes, 343 F.Supp. at 704.

During the previous century only two blacks had ever been elected from Dallas and only five Mexican-Americans from Bexar county. Graves v. Barnes, 343 F.Supp. at 726 n.17, 732. This pattern could not be explained as a result of partisan voting; in both counties winning the Democratic nomination usually guaranteed election to the legislature, and the exclusion of minority candidates had occurred in the Democratic primary.[26/] The district court found that the white legislators were comparatively unresponsive to the needs of minority residents of their districts, White v. Regester, 412 U.S at 767, 769; it noted, for example, that "[s]tate legislators from Dallas County, elected county-wide, led the fight for segregation legislation during the decade of the 1950's." Graves v. Barnes, 343 F.Supp. at 726. All this occurred in a state with a long history of official discrimination against blacks and Mexican-Americans, a policy well calculated to produce the racial bloc voting by whites of which the plaintiffs complained. White v. Regester,

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26/ No Republican had been elected to the House from Bexar county since 1880. Graves v. Barnes, 343 F.Supp. at 731.

412 U.S. at 767-68; Graves v. Barnes, 343 S.Supp. at 725, 726, 727-731.

Appellants urge that White holds only that multi-member districts are unconstitutional when there is an organized slating process which is controlled by whites, which virtually never slates black candidates or candidates favored by the black community, and which effectively determines the outcome of the elections. Brief for Appellants, pp. 8, 22, 23. But White struck down multi-member districts in Bexar County where there was no slating process whatever. Graves v. Barnes, 343 F.Supp. at 731.[27/] The slating practices that existed in Dallas were merely symptoma-

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27/ Appellants suggest that the decision regarding Bexar County stemmed from the fact that there were unconstitutional restrictions on registration and voting by minority voters. Brief for Appellants, p. 22 n.25. But those practices had ended a year before the district court decision and two years before the decision of this Court. Breare v. Smith, 321 F.Supp. 1110 (S.D. Tex. 1971); Garza v. Smith, 320 F.Supp. 131 (W.D. Tex. 1971). No decision of this Court suggests that multi-member districts should be struck down wherever there is a recent history of discrimination in voting; such a rule would preclude the use of such schemes in most of the South. Had that been the rule contemplated by Fortson, that decision, arising in Georgia in 1964, would have struck down multi-

tic of the underlying racial situation, a formalization of the process ordinarily achieved by white bloc voting alone. In the absence of white bloc voting, no slating process which systematically excluded both minority candidates and white candidates sympathetic to the needs of the minority community could long have survived in a county that is 25% non-white. If White had turned on the exclusion of blacks from the slating process -- there equivalent to election -- it would have relied, not on Fortson, Burns and Whitcomb, but on the prohibition against racially closed nominating processes announced in Terry v. Adams, 345 U.S. 461 (1953).

White also recognized that the factual questions presented in such a case require "an intensely local appraisal" of the evidence by the district judge, who inevitably brings to the case a personal familiarity with local history and "past and present reality, political and other-

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member districts throughout the state, since discrimination against black voters was far more virulent and open there and then than the practices that continued in Texas in 1970.

wise." 412 U.S. at 768-770. The district court must assess the existence and impact of white bloc voting, and weigh the significance of other less direct evidence of dilution. White perceived that these are issues often difficult to resolve on a cold record.

The concept of dilution applied in White and Whitcomb is neither amorphous nor unfamiliar to this Court. The same concept has been repeatedly utilized by this Court in assessing redistricting plans subject to section 5 of the Voting Rights Act. Allen v. Board of Elections, 393 U.S. 544, 569 (1969); Perkins v. Matthews, 400 U.S. 379, 388-391 (1971); Georgia v. United States, 411 U.S. 526, 532-35 (1973); City of Richmond v. United States, 422 U.S. 358 (1975); Beer v. United States, 425 U.S. 130 (1976); cf. United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 149, 161 (1978). Georgia v. United States relied on Whitcomb as demonstrating that multi-member districts have "the potential for diluting the value of the Negro vote". 411 U.S. at 535. It relied as well on Reynolds v. Sims, 411 U.S. at 532, as did Perkins, 400 U.S.

at 390. Allen, also relying on Reynolds, noted that placing black voters in a majority white at-large district, could "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." 393 U.S. at 569. Such a system of electing a city government, City of Richmond noted, "created or enhanced the power of the white majority to exclude Negroes totally from participating in the governing of the city through membership on the city council." 422 U.S. at 371.

The uses of the dilution standard under White and section 5, however, differ in two ways. First, section 5 applies only to new redistricting plans which increase the degree of dilution, Beer v. United States, 523 U.S. at 139-142, while White prohibits the use of even old districting plans so long as the degree of dilution is sufficient to substantially undervalue black votes. Second, in a section 5 proceeding the burden of establishing the absence of increased dilution is on the city or state seeking to enforce a new plan, whereas under White the opponent of multi-member districting bears the burden of proof.

Appellants apparently regard racially polarized voting by white residents of Mobile, a practice at times actively encouraged by white officials,[28/] as a normal part of the political process indistinguishable from voting on party lines. Brief for Appellants, p. 31. Both the Constitution and the decisions of this Court properly treat that distinction as of paramount importance. The franchise is a valuable right because it can be exercised to decide "issue-oriented elections." Whitcomb v. Chavis, 403 U.S. at 159. But that right is rendered nugatory if candidates are regularly defeated, not because of their ideas or ideology, but because of the color of their skin or of that of their supporters. In this case the record shows that the overwhelming majority of white voters in Mobile consistently vote against any black candidate regardless of his or her policies or merits.[29/] That is a burden which is not now, and historically rarely has

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28/ See p. 79, infra.

29/ See pp. 69-71, infra.

been, inflicted on any other ethnic, religious, or national group other than blacks and Mexican-Americans.[30] White voters are entitled to cast their ballots on any basis they may please, including that of race. But they are not entitled to have the state maximize the impact of racially based votes by means of at-large elections.

The rule of White and Whitcomb, though originating in Reynolds v. Sims, has several alternative foundations. Anderson v. Martin, 375 U.S. 399 (1964), held that a state could not "encourage its citizens to vote for a candidate solely on account of race" by placing on its

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30/ In 1960, for example, despite the immense publicity and concern about President Kennedy's religion, he received about 40% of the Protestant vote. More than 1 out of 2 votes for President Kennedy was cast by a Protestant voter. T.H. White, The Making of the President 1960, p. 400 (1961).

ballots the race of each candidate. 375 U.S. at 404. Neither can a state enforce an election scheme which operates to maximize the impact of racial voting by whites. Where, as here, racial voting has its roots in a century of officially practiced and advocated discrimination, such a scheme perpetuates the effect of that past discrimination.[31] Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 28 (1971). An election system which "places special burdens on a racial minority within the governmental process . . . is no more permissible than denying them the vote." Hunter v. Erickson, 393 U.S. 385, 391 (1969). Here, as in Hunter, "although the law on its face treats Negro and white . . . in an identical manner, the reality is that the law's impact falls on the minority." 393 U.S. at 391.

Reynolds and its progeny prohibit a state from maintaining an election system which values the votes of one group of voters higher than that of another group, and recognize that this for-

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31/ See, Shofner, "Custom, Law, and History: The Enduring Influence of Florida's Black Code," The Florida Historical Quarterly 277 (Jan. 1977).

bidden result may occur in a variety of ways.[32/] White and Whitcomb hold that a plaintiff may establish the existence of this proscribed unequal valuation by proving that the overall structure of a multi-member district system operates to so maximize the weight of a bloc voting white majority that the votes and electoral preferences of the non-white minority are consistently nullified. Such a system is the functional equivalent of one in which whites reside in a district which has an excess number of elected representatives while blacks are relegated to a district which has no representatives at all.

Reynolds does not require that a group be totally disenfranchised, but only that its votes are not given equal weight. In a malapportionment case it is possible to assess with some precision the weight given to each ballot. This precision of calculation is not feasible in a dilution

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32/ This case presents no issue regarding when such a forbidden result would be caused by a mixed system of single-member and at-large districts or by an array of single-member districts which systematically divided a substantial non-white community among a number of majority white districts. See Beer v. United States, 425 U.S. 130, 142 n.14 (1976).

case under White and Whitcomb; thus a showing of a fairly gross disparity in the weight attached by the election system to the votes of white and black voters will ordinarily be necessary to meet the plaintiff's burden of proof. White and Whitcomb do not guarantee proportional representation for blacks or any other group. If black candidates or white candidates supported by black voters are defeated by ordinary partisan considerations and voting, Whitcomb holds that no unconstitutional dilution of black votes is shown. Where whites do not usually vote as a bloc, an isolated incident in which a black or a black-supported candidate is defeated by white bloc voting would not be sufficient to prove dilution under White.

B. The Irrelevance of Intent Under White and Whitcomb

In a companion case below the court of appeals considered whether a showing of discriminatory motivation was required under Whitcomb and

White. Nevett v. Sides, 571 F.2d 209, 217-225 (5th Cir. 1978). This aspect of Nevett was expressly incorporated into the decision in the instant case. J.S. 2a. A majority of the court of appeals in Nevett held that such intent was necessary in light of Washington v. Davis, 426 U.S. 229 (1976); Judge Wisdom disagreed, concluding instead that proof of intent was not required under White and Whitcomb, 571 F.2d. at 231-38, as had an earlier en banc Fifth Circuit decision. Kirksey v. Board of Supervisors, 554 F.2d 139, 148 (5th Cir. 1977), cert. den. 434 U.S. 968 (1977). Appellees maintain that this aspect of the Fifth Circuit's majority opinion was erroneous. We brief this issue since it bears on whether Whitcomb and White provide an alternative ground for affirmance.

Insofar as appellants or the court below suggest that White and Whitcomb required proof of discriminatory intent prior to Washington v. Davis, the opinions of this Court clearly demonstrate the contrary. The dilution rule was first

suggested by Fortson v. Dorsey, 379 U.S. 433 (1965), which indicated this Court would invalidate a plan if

> designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. 379 U.S. at 433 (emphasis added).

Burns v. Richardson, 384 U.S. 73, 88 (1966), quoted this passage, and then in its own language emphasized that either discriminatory intent or dilution was sufficient to invalidate a multimember district plan, although neither had been proved on the record in that case.

> [T]he demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more apropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting. 384 U.S. at 88-89 (emphasis added).

A legislature's proposed remedy, Burns added, could only be rejected if it "was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 384 U.S. at 89 (emphasis added).

Whitcomb v. Chavis noted at the outset that there was no suggestion that the multi-member districts in that case "were conceived or operated as purposeful devices to further racial or economic discrimination. As plaintiffs concede, 'there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities.'" 403 U.S. at 149. With the intent issue thus disposed of, the Court turned to an exhaustive discussion of whether the evidence established unconstitutional dilution under Fortson, 403 U.S. at 149-160, and the balance of the opinion is concerned solely with the impact of the Marion County multi-member district. This part of the opinion would have been irrelevant, if not unintelligible, if the Court had thought that the absence of discriminatory intent was dispositive of the case. Abate v. Mundt, 405 U.S. 182, 185 n.2 (1971), decided the

same day as Whitcomb, held that multi-member plans would be struck down if they "operate to impair the voting strength of particular racial or political elements...." (Emphasis added).

White v. Regester invalidated under the dilution rule the multi-member districting plans for Dallas and Bexar counties. 412 U.S. at 765-770. White contains not a word regarding the motives of the State Legislative Redistricting Board which had adopted those plans. Rather, it upheld a district court decision which invalidated those plans because they "operated to dilute the voting strength of racial and ethnic minorities," 412 U.S. at 759 (emphasis added), and which held that "the impact of the multi-member district on [Mexican-Americans] constituted invidious discrimination." 412 U.S. at 767 (emphasis added). Two years after White this Court reiterated that the Constitution forbids plans which "designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Chapman v. Meier, 421 U.S. 1, 17 (1975) (emphasis added).

Nothing in Washington v. Davis indicates any intent to overrule this aspect of Fortson, Burns,

Whitcomb, White or Chapman. On the contrary, those five cases and Washington v. Davis deal with two distinct and independent aspects of the Equal Protection Clause. Burns and its progeny, like Reynolds v. Sims, derive from the Clause's guarantee that the votes of citizens will not be weighted differently for any reason. Thus Reynolds does not rest on any malicious intent to disenfranchise urban or suburban voters; it recognized that the differences in the size of districts often derived from good faith concerns, but held that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population based representation." 377 U.S. at 580; see also Lucas v. Colorado General Assembly, 377 U.S. 713, 736-37 (1964). It held that statutes which operate to abridge or deny the franchise must be subjected to strict constitutional scrutiny because the right to vote is "a fundamental right, . . . preservative of all others." 377 U.S. at 562.

Washington v. Davis, on the other hand, considered what types of laws constitute "racial classifications" which trigger the strict scrutiny test. 426 U.S. at 242; see McLaughlin v. Florida, 379 U.S. 184, 191-2 (1969). The prohibition against racial classifications is concerned with "the prevention of official conduct discriminating on the basis of race," Washington v. Davis, 426 U.S. at 238, not the "idea that every voter is equal to every other voter ...." Reynolds v. Sims, 377 U.S at 588. Thus in discussing past cases bearing on the racial classification aspect of the Equal Protection Clause, none of the opinions in Washington v. Davis had occasion to mention the dilution cases. The majority recited a number of lower court opinions using the disapproved effect standard, 426 U.S. at 244 n.12; although the Court was well aware of the application of the dilution test by the lower courts, see East Carroll Parish School Board v. Marshall, 424 U.S. 636, 638 (1976), none of those opinions was cited. The White v. Regester effect rule was referred to with apparent approval in two decisions handed down during the same Term as Washington v. Davis, a step that would have been unlikely had the

Court had any reservations about that rule. East Carroll Parish School Board v. Marshall, supra; Beer v. United States, 425 U.S. 130, 142 n.14 (1976).[33] Even more significantly, White and the other dilution cases were relied on by this Court after Washington v. Davis in Connor v. Finch, 431 U.S. 407, 422 (1977) ("impermissible racial dilution"), United Jewish Organizations v. Carey, 430 U.S 144 (1977),[34] and Wise v. Lipscomb, 57 L.Ed.2d 411, 418 n.5 (1978).

Appellants do not suggest that Washington v. Davis has overruled Reynolds v. Sims, or that a state could after Washington retain districts of unequal population or restore the county unit system invalidated by Gray v. Sanders, 377 U.S. 533 (1963), so long as the state did have a discriminatory motive. Yet such schemes often

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33/ Similarly Keyes v. School District No. 1, 413 U.S. 189, 205, heavily relied on by Washington as establishing a requirement of "purpose or intent to segregate," 426 U.S. at 240, was decided three days after White.

34/ Id. at 165 (plan did not "minimize or unfairly cancel out white voting strength) (White, J.), 170 (plan had not "effectively downgraded minority participation in the franchise") (Brennan, J.), 179 (plan did not "minimize or cancel out the voting strength of a minority class or interest") (Stewart, J.).

underweight the votes of disfavored voters by just 10% or 20%, giving that group only a fractionally smaller portion of the representation to which their numbers entitle them. By contrast at-large systems like those in White underweight the votes of blacks by 100%, and frequently afford them no representation at all. Surely this more drastic form of disenfranchisement remains as subject to attack as the milder forms of geographic malapportionment also forbidden by Reynolds.

Washington v. Davis and this Court have thus recognized that the prohibition against racial classifications and the protection of equal suffrage are two distinct branches of Equal Protection, and that White and Whitcomb are part of the latter branch. Thus the dilution cases, which prior to Washington v. Davis did not require a showing of racial motivation, remain good law.[35]

C. The Applicability of White and Whitcomb to Municipal Elections

Appellants in their Opposition to Motion to Affirm urged that the rule of White and Whitcomb should not be applied to municipal

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35/ See L. Tribe, American Constitutional Law, 754 (1978).

elections. This issue was not raised by their Jurisdictional Statement, is not discussed in the Brief for Appellants, and is not encompassed within the Questions Presented described in either. Most significantly, this issue was never raised by appellants in the courts below, and consequently none of the opinions below considered it. See Brief for Appellants, p. 12. Under these circumstances appellants failed to preserve the issue.

Even were the question properly before this Court, there can be little doubt that White and Whitcomb apply to city elections. At least since Yick Wo v. Hopkins, 118 U.S. 356 (1898), the constitutional commands addressed to the states have been applied to municipalities and other arms of a state. "Political subdivisions of States -- counties, cities, or whatever -- have been traditionally regarded as subordinate government instrumentalities created by the State to assist in the carrying out of State governmental functions." Reynolds v. Sims, 377 U.S. 353 (1964). To establish lower constitutional requirements

for such subdivisions would be to invite the states to evade their constitutional responsibilities by the simple expedient of transferring the affected functions to local governments. See United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148, 162 (majority opinion), 171-72 (Powell, J. concurring) (1978). An attempt to avoid by such distinctions the commands of Brown v. Board of Education, 347 U.S. 483 (1954), was expressly rejected in Cooper v. Aaron, 358 U.S. 1, 15-16 (1958).

The one-person, one-vote requirement of Reynolds, from which White and Whitcomb derive, was applied to local government units in Avery v. Midland County, 390 U.S. 474 (1968). This Court noted:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. . . .In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of

> the application of the Equal Protection Clause of the principles of Reynolds v. Sims, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties. 390 U.S. at 481.

Local governments spend almost twice as much money and have almost three times as many employees as state governments.[36/] With respect to school board elections, this Court reasoned:

> It might be suggested that equal apportionment is required only in "important" elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one.

Hadley v. Junior College District, 397 U.S. 50, 55 (1970). Although the dissenting opinions in Hadley questioned the extension of Reynolds to

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36/ Statistical Abstract, 1972, pp. 410, 433.

certain special purpose entities, they acknowledged that "local units having general governmental powers are to be considered ... like state legislatures." 397 U.S at 61 (Harlan, J., dissenting). Salyer Land Co. v. Tulare Water District, 409 U.S. 719, 727-29 (1973), reaffirmed the application of Reynolds to a "local government exercising general governmental power" or providing "general public services such as schools, housing, transportation, utilities, roads. . . . a fire department [or] police. . . . "

To protect city residents from undervaluation of their votes based on geography, but deny them protection from undervaluation based on race, would be to stand on its head the purpose of the Fourteenth Amendment. Slaughter House Cases, 16 Wall. 36, 71-72 (1873). Of the six decisions of this Court reaffirming the dilution rule first announced in Fortson, none prior to a concurring opinion in Wise v. Lipscomb, 57 L.Ed.2d 411, 423 (1978), intimated that the applicability of that rule was any less broad than the general requirement of Reynolds. On the contrary, Beer v. United States, 425 U.S 130, 142 n.14 (1976), expressly measured a city council districting plan by the

standards of White and Whitcomb. See also United States v. Board of Commissioners of Sheffield, 55 L.Ed.2d 148, 162 (1978). Indeed, the reach of White and Whitcomb seems greater than Reynolds itself, for while it might be permissible in the case of a specialized water district for the legislature to make a reasoned decision to deny the vote to some residents because they were not property owners, it would not be proper to enforce an election system which enabled bloc voting whites to effectively disenfranchise some property owners because they are black. See Salyer Land Co. v. Tulare Water District, supra.

Black voters must have an effective voice in the conduct of local government if they are to achieve the equality of treatment and freedom from discrimination to which we are committed by history and the Constitution. A majority of blacks in the United States live in cities of over 25,000.[37/] For them, as for the black residents

37/ See 1970 Census, Characteristics of Population, v.1, Tables 48, 67.

of Mobile, how those programs and laws are administered is vital to their safety, health, and very lives. Mobile's city government is responsible for police and fire protection, sewers, roads, drainage, zoning, libraries, job training, public housing, industrial development, and parks and recreational programs, and operates its own court system. If local government, like the states, is an ongoing experiment in the development and delivery of essential public services, Holt Civic Club v. City of Tuscaloosa, 47 U.S.L.W. 4008, 4011-12 (1978), it too is an experiment in which blacks are entitled to participate on the same basis as whites.

D. The Application of White and Whitcomb to The Facts of This Case

The doctrine of White and Whitcomb is both well established and well founded. Whether the district court correctly found the constitutionally forbidden dilution on the record in this case is a distinct issue, but an issue of relatively narrow import. Appellees did not challenge the validity of all at-large elections or of

all at-large elections under the commission form of government, nor could we have done so. The courts below did not hold that at-large elections or the commission sytem were unconstitutional throughout the country or throughout Alabama, but dealt solely with the facts in this record regarding Mobile. In three companion cases below the Fifth Circuit declined to strike down at-large plans,[38] as it had previously refused to do in a substantial number of earlier cases.[39]

The impact of such election schemes varies widely with local circumstances; although multi-member districts had the prohibited consequences in Dallas and Bexar counties, that did not mean they necessarily had such an effect elsewhere in Texas or in the South. As appellants correctly note, blacks are able to win elections in some

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38/ Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), cert. pending, No. 78-492; Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).

39/ E.g., Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975).

cities despite the use of multi-member districts, Brief for Appellants, pp. 11, 18, presumably because related election laws, local political and/or racial realities were different than in Dallas. The issue here is whether the evidence and district court findings support the court's conclusion that the use of at-large elections in Mobile operated "to minimize or cancel out the voting strength" of the black population. This factual finding was concurred in by the court of appeals, and should be upheld in this Court.

The district court's ultimate finding of dilution was grounded on a number of subsidiary findings, none of which is seriously disputed by appellants.

First, the district court found there was racially polarized bloc voting by white voters in Mobile. "The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs." Appellants concede that this white bloc

against black candidates and interests is an "unfortunate feature of voter behavior." Brief for Appellants, pp. 30-31.[40/]

Second, the district court noted that no black had ever won any at-large election to any public office in Mobile, including elections to the city commission, the school board, or the state legislature. J.S. p. 7b, 8b, 35b. It also concluded that in Mobile there is "no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization," J.S. 10b, noting that "[p]ractically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected

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40/ Exhaustive analyses of election returns were prepared by experts for the defendants, A. 581-90, and for the plaintiffs. A-56-66, 591-92; P. Ex. 10-52. Both concluded that whites voted as a bloc against blacks and black-supported candidates. The trial judge noted that the existence of such racial bloc voting in Mobile was "common knowledge." A. 65.

against a white." J.S. 7b-8b.[41/] Appellants do not directly dispute this finding, but urge that able black candidates can carry "a City," citing as examples Detroit, Newark and Los Angeles. Brief for Appellants, p. 11, n.14. But the constitutionality of at-large elections in Mobile depends on the political and racial realities of Mobile, not of Detroit or Dallas.

Third, the district court concluded that "the city-wide elected municipal form of government as practiced in the City of Mobile has not [been] and is not responsive to blacks on an equal basis with whites. . . . Past administrations not only acquiesced to segregated folkways, but actively enforced it by the passage of numerous city ordinances." J.S. p. 35b-36b. The court found that under the all-white commission the city had since 1960 maintained segregated airport,[42/]

41/ This finding is fully supported by the record. A. 79-50, 96, 119, 128, 129, 138, 147, 198-99, 207-208, 305, 518; P. Ex. 98, pp. 37-38; P. Ex. 99, pp. 20-22, 26, P. Ex. 100, pp. 23-25, 33.

42/ J.S. 126.

bus,[43] and recreation facilities,[44] discriminated against black neighborhoods in providing for drainage,[45] road repairs,[46] sidewalks,[47] and parks,[48] and discriminated against blacks in the hiring and assignment of city employees,[49] particularly police officers.[50] Although blacks constitute 35% of the Mobile population, the evidence showed that less than 7% of some 800 people recently appointed by the white commissioners to local government boards and committees were black,[51] and that 29 of the active boards and

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43/ J.S. 12b.

44/ J.S. 12b.

45/ J.S. 15; A. 524-25, 531-33.

46/ J.S. 16; A. 614, 619.

47/ J.S. 16; P. Ex. 75.

48/ J.S. 17.

49/ J.S. 11b-14b; P. Ex. 73.

50/ J.S. 11b; see n.52, infra.

51/ J.S. 12b-14b; A. 601-604; P. Ex. 64.

committees had no black members at all. A. 601-604. Of the 290 city employees paid over $10,000 a year, only 3 were black. A. 917. The court emphasized that federal courts had repeatedly been required to enjoin discrimination by Mobile.[52] The district judge noted that as recently as 1976 white police officers in Mobile had conducted a mock lynching of a black suspect,[53] and that the white city officials had

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52/ J.S. pp. 12b, 36b; Allen v. City of Mobile, 18 F.E.P. Cases, 217 (S.D. Ala. 1978); Allen v. City of Mobile, 331 F.Supp. 1134 (S.D. Ala. 1971), aff'd 466 F.2d 122 (5th Cir. 1972), cert. den. 412 U.S. 909 (1973); Anderson v. Mobile City Commission, Civil Action No. 7388-72-H (S.D. Ala. 1973); Sawyer v. City of Mobile, 208 F.Supp. 548 (S.D. Ala. 1963); Evans v. Mobile City Lines, Civil Action No. 2193-63 (S.D. Ala. 1963); Cooke v. City of Mobile, Civil Action No. 2634-63 (S.D. Ala. 1963).

53/ P. Ex. 65; A. 605-610. Eight white officers placed a noose around the neck of the suspect, strung it over a tree, and pulled the man to his tiptoes. Defendant Doyle, a white city commissioner, objected to use of the term "lynch" because the victim had not died. A. 266. Charges against the black suspect who was the victim of this outrage were later dropped. See also Pl. Ex. 65.

investigated the incident with notable reluctance. The court concluded that that "sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the political fear of the white backlash vote when black citizens' needs are at stake." J.S. 19b.[54/]

Fourth, the district court noted that Alabama had a long history of officially practiced and advocated racial discrimination against potential black voters, a history in which white officials from Mobile had played a leading role.[55/] Not until the Voting Rights Act of 1965 were blacks able to register in substantial numbers.[56/] The court concluded that in Mobile "[t]he pervasive effects of past discrimination still substantially affect black political participation." J.S. 7b.

54/ All three of the present white commissioners stated that they would not support local ordinances prohibiting racial discrimination in housing or employment. A. 301-02, 480, 497-99.

55/ J. S. 19b; P. Ex. 2, pp. 50-51, 53-54.

56/ Prior to that Act the black registration rate in Mobile was lower than even other urban areas in the South. S. Lawson, Black Ballots: Voting Rights in the South, 1944-1969, p. 9 (1976).

Finally the court noted the existence of several election rules not essential to at-large elections that aggravated the dilutive effect of Mobile's at-large system. The system, like that in White v. Regester, includes a majority run-off and numbered place requirement, which "enhanced the opportunity for racial discrimination." White v. Regester, 412 U.S. at 766; J.S. 21b, 39b, 40b. Also, as in White, there was no residence requirement, so that "all candidates may be selected from outside the Negro residential area." White v. Regester, 412 U.S. at 766 n.10; J.S. 21b, 40b.

Appellants do not directly question these findings, but offer several contentions by way of defense.

Appellants contend that no black has ever been elected to the city commission because in their view the black candidates who have run were not "able" or "serious" candidates. Brief for Appellants, p. 11. The district court, however, found, and virtually all the city politicians who testified agreed, that a black would not win such a city-wide race, and that the certainty of electoral defeat had deterred black politicians

in Mobile from running for the commission. J.S. 11b, 35b.[57/] The evidence showed that a serious campaign for the city commission cost $50,000,[58/] a very substantial sum in a city were the average black family earns only $4,617.[59/] It is hardly surprising that few black leaders had volunteered to undergo the pointless exercise of spending such sums and a commensurate amount of time and effort on a race that was certain to be lost because of white bloc voting. There was, moreover, ample evidence as to the bloc voting by white Mobile city residents against black candidates of undisputed experience and qualification who ran for the school board and county commission.[60/]

57/ That finding is amply supported by the record. A. 79-80, 96, 129, 147, 198-99; P. Ex. 99, pp. 20-22; P. Ex. 100, p. 23-25.

58/ A. 482-83; P. Ex. 100, p. 23.

59/ Census of Population, County and City Data Book, 1972, p. 633.

60/ J.S. 8b-10b; A. 592; see also the district court's opinion in the Mobile school board case, Williams v. Brown, No. 78-357, J.S. 6b-7b. Two-thirds of the county population lives in the city of Mobile. The appellants' own experts relied on data from such county races in drawing conclusions regarding Mobile city voters. P. Ex. 9; A. 575-90.

Appellants point to the election of white Commissioner Joseph Langan as evidence of black political influence. Brief for Appellants, pp. 8-9. We agree that what happened to Commissioner Langan is important, but contend that it substantiates the district court findings of dilution. Langan was elected to the commission in 1953, when black registration was so low that blacks were not "a significant factor" in Mobile elections. A. 115. Although Langan initially had the support of a majority of white voters, he courageously established a moderate record of disapproval of discrimination. The record indicates, however, that racial polarization increased in Mobile as a federally imposed end to segregation finally became a reality in the late 1960's.[61/] It was not until Langan's last race in 1969 that the 1965 Voting Rights Act had removed the massive discrimination against blacks seeking to register and

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61/ This was the view of the defendants' own expert. See A. 582-85.

vote. In that race he received the overwhelming majority of the substantial black vote. But Langan was defeated despite that black support, "because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city." J.S. 9b.

The defendants' own expert concluded that "[i]dentification with the black wards is the kiss of death for an office-seeker in Mobile. The black voters constitute such a visible and emotional issue that any identification with blacks in Mobile will produce a reaction by white voters and defeat the black supported candidate." A. 585[62/] The record reveals that Langan's 1969 oppponent circulated advertisements attacking him for having received the support of black voters,[63/] and pointedly displaying

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62/ Black and white politicians agreed with this conclusion. A. 95, 119, 136-37; P. Ex. 98, p. 10; P. Ex. 99, p. 9; P. Ex. 100, p. 10.

63/ Court of Appeals Appendix, v. II, p. 711.

photographs of a black whom Langan had appointed to a city board.[64/] Other political literature in recent Mobile elections also attacked white candidates for receiving black votes, juxtaposed photographs of such candidates with black leaders, and even villified one white female candidate for having "been seen and photographed in the company of black males."[65/]

Finally, appellants argue that, even if it is impossible to elect a black in Mobile, black voters participated effectively in the political process because they are permitted to vote on which white candidate would be elected to the city commission. They note that in 1973 white candidates sought the endorsement of the black Non-Partisan Voters League, Brief for Appellants, p. 9, and suggest that blacks provided the margin of victory for Commissioner Greenough in 1973 and perhaps in other races. Id. pp. 8-10 and n. 7.

64/ Id. p. 712.

65/ Id. pp. 704-714; P. Ex. 61, 97; A. 593-99.

The record reveals a very different story. Although several white candidates sought and received the endorsement of the Non-Partisan Voters League in 1973, that was not indicative of black support; a substantial majority of the black voters voted against the endorsed candidates.66/ The defendants own expert concluded that since 1960, with the exception of Langan, "no candidate who has won a majority in the black wards has also carried the entire city." A. 582. The record reveals that Commissioner Greenough lost the black vote by a margin of about 60% to 40%, Tr. 1133-35, and won the 1973 election only because he had the support of approximately 60% of the white voters.

It was doubtless the case in Dallas and Bexar counties in White v. Regester that the votes of blacks and Mexican-Americans might at times influence the outcome of a race between white candidates, but that was also true of the under-

66/ D. Ex. 28, 29.

valued votes cast in large counties in the county-unit system condemned by Gray v. Sanders, 372 U.S 368 (1963). White forbids the use of an at-large system which affords to blacks "less opportunity than . . . other residents in the district to participate in the political process and to elect [officials] of their choice." 412 U.S. at 766. A system which, as here, operates to preclude blacks from electing any candidate of their own race or choice while permitting white voters to elect a candidate of theirs does not provide that equality of opportunity.

The record in this case thus reveals the type of evidence found missing in Whitcomb and deemed sufficient to establish a constitutional violation in White: racial bloc voting by whites that consistently defeats black candidates, unresponsiveness and racial discrimination by white officials elected at-large, a long history of

official discrimination, and the existence of laws which aggravate the racial effect of the at-large system. The district court's analysis of that evidence is far more exhaustive than that of the district court in White. Representing as it does "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multi-member district in the light of past and present reality, political and otherwise," 412 U.S. at 769-70, the district court's finding of dilution should be upheld.

IV. MOBILE'S AT-LARGE ELECTION SYSTEM VIOLATES THE FIFTEENTH AMENDMENT

The complaint in this action alleged that Mobile's at-large election system violated the Fifteenth Amendment as well as the Fourteenth. A. 18. Although both courts below noted the existence of this claim, J.S. 4a, 1b, neither discussed it. Appellees maintain that the Fifteenth Amendment provides an alternative ground for affirmance.

Appellees urge that the Fifteenth Amendment's specific protection of suffrage, unlike the Fourteenth Amendment's generalized prohibition of racial classifications, does not require a showing of racial motive or purpose. The Fifteenth Amendment forbids the denial or abridgment of the right to vote "on account of race, color, or previous condition of servitude." This phrase is literally broad enough to encompass state laws which operate to disenfranchise blacks as well a those which are intended to do so. The decisions of this the Court have construed the Fifteenth Amendment to include both sorts of statutes.

The proper application of the Fifteenth Amendment is well illustrated by Lane v. Wilson, 307 U.S 268 (1939). Lane involved an Oklahoma statute which provided that any resident who had not voted in the 1914 general election would have to register during a 12 day period in 1916, or be permanently barred from registration. 307 U.S. at 270-71. Subject to disenfranchisement if they failed to register during this brief period were

(a) whites eligible to vote in the 1914 elections who had failed to do so, (b) blacks eligible to vote in the 1914 elections who had failed to do so, and (c) blacks ineligible to vote in the 1914 elections because they could not satisfy the state literacy test then in effect, a test held invalid in Guinn v. United States, 238 U.S. 347 (1915) because it contained a "grandfather clause" that effectively exempted whites from the test. The court of appeals held that the statute was valid, emphasizing:

> There were probably also some whites who were qualified to vote at the 1914 elections who did not vote. They were on the same footing as to registration as were the qualified negroes. There was no distinction between them. Lane v. Wilson, 98 F.2d 980, 984 (10th Cir. 1938).

This Court agreed that the statute was neutral on its face, and did not question the motives of the legislature in adopting it, an inquiry apparently precluded by this Court's decisions of that era barring proof of legislative motivation. Arizona v. California, 283 U.S. 423, 455 (1931); see also Palmer v. Thompson, 403 U.S. 217, 224-26 (1971); United States v. O'Brien, 391 U.S. 367, 382-86 (1968).

This Court nonetheless upheld the plaintiff's claim that the law was unconstitutional because it "inherently operates discriminatorily." 307 U.S. at 274. Justice Frankfurter reasoned that the Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." 307 U.S. at 275. The period afforded for registration was "too cabined and confined", 307 U.S. at 276; although literally applicable to both blacks and whites, the law "operated unfairly" against blacks because of social circumstances which deterred and discouraged the unusually swift action required to protect the right to vote. 307 U.S. at 276-77.

In attaching such significance under the Fifteenth Amendment to the onerous operations of an election system, Lane was fully consistent with other opinions of this Court. In striking down the "grandfather clause", Guinn made no reference to the motives of the legislature which had adopted it, and the parties there apparently agreed that judicial consideration of such motives

would have been inappropriate. 238 U.S. at 359-61; see also 59 L.Ed.2d at 1341-43. South Carolina v. Katzenbach, 383 U.S. 301 (1966), states that the Fifteenth Amendment invalidates "state voting qualifications or procedures which are discriminatory on their face or in practice", 383 U.S. at 325, citing Lane and Guinn. Justice Harlan suggested that the Amendment covered "discriminatory . . . effect" and "unconscious" discriminatory application in Oregon v. Mitchell, 400 US. 112, 216 (1970) (dissenting opinion). Justices Marshall and Brennan took the same position in Beer v. United States, 425 U.S. 130, 149 n.5 (1976) (dissenting opinion).

Washington v. Davis noted that a failure to confine the racial classification branch of Equal Protection law to instances of purposeful discrimination "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public services, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the more affluent white." 426 U.S. at 248. Those considerations do not support a similar restriction

on the Fifteenth Amendment, since its scope is narrowly confined to the area of voting. Although the Civil War amendments are directed generally at protecting racial minorities, the Thirteenth and Fifteenth Amendments single out for emphasis the freedom of blacks from involuntary servitude and from denial or abridgment of the right to vote. A heightened degree of protection for these particular rights seems warranted in light of the special treatment accorded them by the Constitution on its face.67/

The Congress which framed the Fifteenth Amendment was not conerned merely to enable blacks to mark ballots, but to arm them with the franchise so that they could protect themselves against discrimination. That Congress regarded the franchise as "a fundamental political right,

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67/ The Thirteenth Amendment has been consistently construed to invalidate statutes which, regardless of motive, operate to facilitate the coercion of labor. Bailey v. Alabama, 219 U.S. 219, 244-45 (1911); see also Pollack v. Williams, 322 U.S. 4, 25 (1944); Taylor v. Georgia, 315 U.S. 25, 29 (1942); Clyatt v. United States, 197 U.S. 207, 216 (1905).

because preservative of all others." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1996). Senator Stewart, the leading Senate proponent of the Amendment, argued that the right to vote

> is the only measure that will really abolish slavery. It is the only guarantee against peon laws and against oppression. It is that guarantee which was put in the Constitution of the United States originally, the guarantee that each man shall have a right to protect his own liberty.68/

Congressman Shanks urged:

> No man is safe in his person or property in a community where he has no voice in the protection of either. The subjugation of his rights and liberties, the seizure and waste of his property, the degradation of his character, and the insecurity of his life are only questions of time that are not often long deferred.69/

This view was shared by numerous supporters of the Amendment,70/ who feared that with the end of

68/ Cong. Globe, 40th Cong., 3rd Sess., p. 668.

69/ Id p. 693.

70/ Id. pp. 709 (remarks of Sen. Pomeroy), 722 (remarks of Rep. Kelley), 912 (remarks of Sen. Wilkey), 982-23 (remarks of Sen. Ross), 990 (remarks of Sen. Morton).

Reconstruction whites hostile to the Union would regain control of the Southern states and seek to strip the newly freed slaves of the rights for which the Civil War had been fought.71/ Some Republicans felt that the rights of blacks would not be secure if they could only choose among candidates of the white aristocracy which had dominated the antebellum South,72/ but Stewart and others contemplated that the right to vote would carry with it the ability of blacks to elect black officials.73/ The Amendment was intended to guard against, not only state attempts to formally "deny" blacks the right to cast ballots, but also state election schemes which "abridge" that right by so nullifying the effect of black votes as to eviscerate their value as a defense against discrimination and oppression.

The Fortieth Congress envisioned that the critical role of the Amendment would be

71/ Id. pp. 724 (remarks of Rep. Ward), 900 (remarks of Sen. Williams).

72/ Id. p. 1626 (remarks of Sen. Edmunds).

73/ Id. p. 1627 (remarks of Sen. Wilson), 1629 (remarks of Sen. Stewart).

to protect black voters from as yet unknown forms of denial or abridgment of the right to vote. When the Amendment was passed blacks uniformly enjoyed the franchise throughout the South, which was under the control of the Union Army and the watchful eye of the Freedmen's Bureau.[74/] The concern of Congress was with possible devices and election systems which might be introduced in the South in years ahead. The prohibition against abridgement of the franchise is indicative of this concern, for there were in 1869 no practices to which "abridge" could have applied, and none is cited in the debates; the term was evidently included to encompass possible forms of partial disenfranchisement that might emerge in the future.

The election system in operation in Mobile strikes at the very heart and purpose of the Fifteenth Amendment. In form blacks are able to mark and cast ballots, but in substance they are disenfranchised. They cannot elect any black to the city commission. They cannot elect to the

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74/ Id. pp. 724 (remarks of Rep. Ward), 979 (remarks of Sen. Frelinghuysen), 981 (remarks of Sen. Frelinghuysen), 984 (remarks of Sen. Ross).

commission any white known to support fair treatment for the black community. And they cannot protect themselves against a pervasive policy of discrimination which runs rampant through the operations of the city government. In the district court the defendants proposed[75/] that an appropriate remedy for this situation would be for the court to engage in ongoing monitoring and supervision of every city agency to detect and redress any act of discrimination. Neither principles of federalism nor considerations of comity recommend such federal receivership. The Constitution requires that an effective franchise be conferred on blacks so that they can protect themselves against government discrimination. Mobile's election system must be modified to do so.

75/ Defendants Proposed Plans, p. 2.

V. THE DISTRICT COURT CORRECTLY FORMULATED A REMEDY FOR THE PROVEN VIOLATION

The Jurisdictional Statement contains a question regarding the remedy fashioned by the district court, J.S. 4, but it is not included in the Questions Presented in the Brief for Appellants, pp. 3-4. Neither the body of the Jurisdictional Statement, nor the Brief for Appellants discusses that question. We contend that the district court acted properly in formulating a remedy.

As the court of appeals noted, the defendants in the district court, despite the finding of a violation, "refused to come forward with a plan, forcing the district court to fashion a remedy."[76/]

76/ At the end of the trial the court ordered the parties to submit proposed plans in the event that the court found the at-large system unconstitutional. The defendants responded by proposing several "plans," such as denying any injunctive relief but retaining jurisdiction, all of which contemplated electing all commissioners at-large. Proposed Plans of Defendants, pp. 2-4 (filed September 8, 1976). This recalcitrant response constituted neither a "plan" relevant to Wise nor compliance with the district court's order.

J.S. 13a. Under that circumstance it was the obligation "of the federal court to devise and impose a reapportionment plan." Wise v. Lipscomb, 57 L.Ed. 2d 411, 417 (1978). Manifestly some alteration of Mobile's method of election was required to remedy the proven violation, and Chapman v. Meier, 420 U.S 1 (1975), required the district court in fashioning its own plan to use only single-member districts.

The district court's problems were further aggravated by the fact that the defendants adamantly opposed electing commissioners from single-member districts,[77/] even though commissioners are chosen in this manner in a number of other cities.[78/] Defendants also indicated

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77/ A. 33; Tr. 348-50, 1149-53.

78/ All the commissioners are chosen from single-member districts in Harrison, Hatfield, Nether Providence and Ridley, Pennsylvania. All but one of the commissioners in Weehawken, New Jersey, Vicksburg, Mississippi, and Ottawa, Illinois are chosen from such districts. Municipal Yearbook, 1978, pp. 18, 26, 30, 36-37.

that, if there were to be single-member district elections, they preferred to change the form of Mobile's government to a mayor-council plan.

Anxious to induce the defendants to play some constructive role in the preparation of a plan, the district court persuaded the city to nominate two members of a three member advisory committee to propose a remedy. The committee proposed a plan based on the mayor-council form of government in force in Montgomery, an Alabama city comparable in size to Mobile. After submission of this proposal the court invited and received comments on the plan from both counsel for the parties and other elected officials from Mobile. The district judge adopted the plan with some modifications based on those comments. Ever concerned to avoid any unnecessary intrusion into state and local affairs, the district judge also expressly provided that the legislature could at any time replace the court approved plan with any other "constitutional form of government for the City of Mobile," and could authorize the city itself to do so. J.S.

3d. The legislature, however, has never acted to adopt or authorize any other reapportionment plan.

We noted earlier that the district court did not condemn the use of the commission form of government throughout the country or even elsewhere in Alabama. The district court's order does not even forbid Mobile itself to adopt a variant of the commission system. Mobile could, with appropriate authorization by the legislature, adopt a commission form of government under which, as in other states, all or most commissioners were chosen from single-member districts. The city might also create a city council with members elected from both single member and at-large districts and provide that the at-large members would hold the executive power of the government. See Wise v. Lipscomb, 57 L.Ed.2d 411 (1978).[79/] Mobile and Alabama thus remain free to use "many innovations, numerous combinations of old and

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79/ Whether such a scheme would be constitutional would depend, inter alia, on the number of single and multi-member seats.

new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions." Holt Civic Club v. City of Tuscaloosa, 47 U.S.L.W. 4008, 4012 (1978).

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

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